No. 88-45

In The
Supreme Court of the United States
October Term, 1988

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SHERRI SPILLANE,

Petitioner,

vs.

FRANK MORRISON SPILLANE,
a/k/a MICKEY SPILLANE,

Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

—o—

PETITIONER'S REPLY BRIEF

—o—

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MR. THOMPSONS DISTORTIONS, EXAGGERATIONS AND AD HOMINEM ATTACKS TO THE CONTRARY, THIS CASE CONSISTS IN THE DENIAL OF SHERRI SPILLANE'S DUE PROCESS RIGHTS

On the morning of April 26, 1983, Mickey Spillane sat in his Las Vegas hotel room placing telephone calls to the Clark County Courthouse. By 10:20 a.m. that morning Nevada Eighth Judicial District Court Judge Robert G. Legakes had signed the ex parte amended decree of divorce.

The amended decree ipso facto changed the date of the divorce from April 7, 1983, to April 26, 1983, added the language "non-modifiable alimony and property settlement", deleted original decree language ordering Mickey to "pay the medical expenses of the plaintiff", and substituted language ordering Mickey to "provide . . . adequate medical insurance coverage". The amended decree was not styled a nunc pro tunc decree. It revised legal rights and obligations which the original decree had settled with presumed finality; therefore, it superseded the original decree.

Once Sherri was forced to engage in extended post trial litigation she was then able to obtain testimony from Judge Legakes, his bailiff Russell Beckwith, his secretary Sheryl Hartle, and his clerk Rose Child at the trial before District Judge Myron E. Leavitt during the week of July 7, 1986. Bailiff Russell Beckwith testified that Judge Legakes had instructed him to find Mickey Spillane in the courthouse lobby and bring him back to chambers.[1] The

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[1]Russell Beckwith, bailiff to Judge Legakes testified as follows:

MR. MALINOU: "Q Under what circumstances did you meet the defendant, Mr. Frank Morrison Spillane?"

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bailiff escored Mickey Spillane to a seat beside Judge Legakes' secretary Sheryl Hartle and left the room. Who placed the telephone call to Judge Legakes prompting him to send his bailiff to find Mickey Spillane in the courthouse lobby and bring him back to chambers on the day he entered the amended decree ex parte is a mystery not answered by the trial testimony.[2] And how Judge Leavitt could rule that the amended decree came within the ambit of clerical correction provisions of Rule 60(a) of the Nevada Rules of Civil Procedure remains an equal mystery.

The subject matter of this petition for certiorari is an ex parte proceeding against the petitioner to amend the decree of divorce. Respondent Mickey Spillane's contention (Brief in Opp., p. 23) that 11 U.S.C. 362(a) does not stay actions initiated by debtors is a half truth. Mickey concedes, as he must, that 11 U.S.C. 362(a) stays proceedings against debtors. He then discusses actions initiated by debtors.

The ex parte amended decree challenged Sherri's divorce complaint. 11 U.S.C. 362(a) stays the "continua-

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THE BAILIFF: "A To the best of my recollection, I was instructed by Judge Robert Legakes to go out to the lobby of the courthouse and try to locate Mr. Spillane, which I did."

. . .

MR. MALINOU: "Q Where did you escort him?"

THE BAILIFF: "A Back to chambers."

MR. MALINOU: "Q Would that be Judge Legakes chambers?"

THE BAILIFF: "A Correct."

MR. MALINOU: "Q What happened then?"

THE BAILIFF: "A To the best of my recollection, I went on back to chambers, and he had a seat next to the secretary's desk." (Trial Transcript, sec. 1, pp. 45-46)

tion . . . of a judicial . . . action or proceeding against the debtor". The disjunctive "or" employed by the Congress between "action" and "proceeding" is a recognition that some litigation is composed of discrete disputes within the overall case. A "proceeding" within an overall divorce "case" is the relevant judicial unit for purposes of applying the automatic stay to "proceedings against the debtor". The history of bankruptcy law is persuasive in that there is an uninterrupted tradition of judicial interpretation in which courts have veiwed a "proceeding" within a bankruptcy case as the relevant "judicial unit". For a discussion see, *In Re Saco Local Development Corp.*, 711 F. 2d 441 (CA 1 1983).

The ex parte amended divorce decree proceeding is a separate and discrete dispute within the overall divorce. Mickey had a right to appeal the entry of the original divorce decree awarding Sherri medical expenses rather than medical insurance premium payments. Instead, he moved ex parte to change its award of medical expenses to medical insurance premium payments, and thus initiated a separate discrete dispute; in this discrete proceeding, Sherri was clearly not the initiator and the refusal of the Nevada courts to honor the stay required under bankruptcy law clearly violates her rights as provided by that law.

The normal procedures for amending divorce decrees was not followed by the trial court according to the testimony of Judge Legakes' law clerk Bea Jeannie Banks, Esq.[2] Rule 60(a) of the Nevada Rules of Civil Procedure

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[2]Bea Jeannie Banks, Esq. appearing voluntarily testified as follows:

MR. MALINOU: "Q . . . did you ever have occasion to review a proposed amended decree of divorce in a case called Spillane versus Spillane?"

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allows only clerical errors in decrees to be corrected by the court without prior notice to the parties. Rule 60(a) does not authorize the court to change the date on which parties were divorced,[3] nor change an award of medical expenses

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MISS BANKS: "A No."

MR. MALINOU: "Q Miss Banks, what was the ordinary procedure for obtaining an amendment to a divorce decree in Department XII in April of 1983?"

MISS BANKS: "A There would have to be filed a written motion to amend the decree. That motion would have to have been accompanied by service to the opposing party, and that motion would have come through my desk. I would have had to have reviewed it and submitted my recommendation to the judge."

MR. MALINOU: "Q Do you recall reviewing papers in a divorce case called Spillane versus Spillane?"

MISS BANKS: "A No, I don't."

. . .

MR. MALINOU: "Q If once a proper person divorce had been granted, someone moved to amend the decree, under ordinary procedures would that motion to amend have crossed your desk?"

MISS BANKS: "A Yes, I would review that." (Trial Transcript, sec. 1, pp. 64-65)

[3]The ex parte amended decree changed the date of the divorce from April 7, 1983, to April 26, 1983. It was not styled a nunc pro tunc decree. During the July 1986 trial on fradulent concealment of marital assets allegations District Judge Myron E. Leavitt ruled:

"THE COURT: . . . under our rules, Rule 60(a), that any clerical mistakes, judgments, orders or other parts of the order, errors arising in oversights or omissions, may be corrected by the Court at any time.

"That's apparently what Judge Legakes did. He said there was an error in omission or commission in this case, and corrected it pursuant to Rule 60(a), which he has authority to do.

. . .

"Now all this testimony, at least it seems to me, to be aimed at showing that there was something wrong with what Judge Legakes did when he amended the decree of divorce, that there should have been notice.

"Well, the rule does not require it." (Trial Transcript, sec. 1, pp. 92-93)

to payment of medical insurance premium alone. Mickey has seized on the ruling that the ex parte amendment was authorized and does not create a void decree for lack of jurisdiction remediable under Rule 60(b)(3) as a premise for his argument that Question Presented III (Petition for Certiorari, p. ii) is not reviewable because no appeal was taken from the amended decree (Brief. in Opp., p. 26-27). On the contrary, the court's action in entering the ex parte amended decree denied Sherri her due process rights and must be addressed under Rule 60(b)(3). To refuse such review is an abuse of the court's power. The ex parte amended decree was void for lack of jurisdiction because Mickey did not give her prior notice and opportunity to be heard. As a result of this action by Mickey and by the Court, Sherri challenged the ex parte amended decree under Rule 60(b)(3) of the Nevada Rules of Civil Procedure which allows void decrees to be vacated at any time. Judge Leavitt denied that motion once by Order entered on April 18, 1985 (Petition for Certiorari, p. H-1, 2), and Sherri appealed to the Nevada Supreme Court (docket #16643). Judge Leavitt "once again denied" that motion by Judgment entered on July 30, 1986 (Petition for Certiorari, p. J-1, 2), and Sherri appealed to the Nevada Supreme Court (docket #17584) once again.

THE JUDGMENT SOUGHT TO BE REVIEWED RESTS ON FEDERAL GROUNDS AND NOT ON ADEQUATE, INDEPENDENT STATE GROUNDS

The judgment sought to be reviewed is dismissal of Sherri's appeals because (1) she failed to secure new Nevada counsel within 30 days after September 23, 1987, (2) she failed to file the trial court record in the appeal she noticed on August 12, 1986 from the second denial of

her August 22, 1984 Motion To Vacate Decree Of Divorce challenging the ex parte amended decree of divorce, and (3) she failed to pay to Mickey (a) a $500 monetary sanction assessed on September 4, 1986 for contending that her August 22, 1984 motion labeled "Motion To Vacate Decree Of Divorce" was a motion for a new trial (which tolled the period to appeal the amended decree), and (b) a $500 monetary sanction for filing a notice of appeal on August 12, 1986 which was characterized as duplicating much of her notice of appeal filed on May 22, 1985 appealing the denial of her Motion To Vacate Decree Of Divorce.

The asserted state grounds for dismissal of Sherri's appeals are insufficient because the appellate proceedings in the Nevada Supreme Court were stayed by the automatic stay ordered by the bankruptcy court on February 21, 1985. The state ground must be broad enough, without reference to the federal question, to sustain the state court judgment, notwithstanding any error in deciding the federal question. *Murdock v. Memphis,* 20 Wall. 590, 636 (1875); *Beaupre v. Noyes,* 138 U.S. 397, 401 (1891); *Eustis v. Bolles,* 150 U.S. 361, 370 (1893). Once the error in federal law is corrected and the bankruptcy stay is applied to the appellate proceedings sought to be reviewed, no state ground remains to support the judgment of dismissal.

If, arguendo, the bankruptcy stay does not apply, the state grounds are neither adequate nor independent to support the dismissal of Sherri's appeals. The state ground of decision that Sherri failed to secure new counsel is necessarily interwoven with her right to represent herself. It has long been true that jurisdiction does exist where the state ground "is so interwoven with the other [federal ground] as not to be independent." *Enterprise*

Irrigation District v. Canal Co., 243 U.S. 157, 164 (1917); *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *Ake v. Oklahoma*, 470 U.S. 53 (1985) ("when resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the [state] court's holding is not independent of federal law, and our jurisdiction is not precluded"). In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held that indigent persons had a right of access to the court in matters of divorce, and had the right to represent themselves. The Nevada Supreme Court order to Sherri to secure new Nevada counsel denies her the right to appear pro se and clearly contradicts *Boddie*.

An untenable state ground is an inadequate state ground. The Supreme Court applies its own standards in making this adequacy inquiry, and is not precluded from reaching its own conclusions. *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931); *Staub v. Baxley*, 355 U.S. 313, 318-19 (1958); *NAACP v. Alabama*, 357 U.S. 449, 455 (1958). Supreme Court review cannot be evaded by reliance on a state ground "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District v. Canal Co., supra*, at 164. The Nevada Supreme Court ground of decision that Sherri failed to file the trial court record is incorrect on the record. That court acknowledges that the record in appeal #16643 was on file. What that court misconceived is that the August 12, 1986 notice of appeal did not apply to the independent action (Dist. Ct. A232411) judgment for Mickey on Sherri's allegations of fraudulent concealment of marital assets, and expressly disavowed an appeal from the fraud action disposition. The August

12, 1986 notice of appeal was filed to address only that portion of the judgment entered July 30, 1986 which "again denied" Sherri's Motion To Set Aside Decree Of Divorce" (filed August 22, 1984) in divorce case D53075. The court record will show that the transcript of Sherri's argument for reconsideration of the Motion To Vacate Decree Of Divorce and its denial, along with denial of a request for spousal support, heard on the opening day of trial on the fraud count of independent action A232411, was not filed. That transcript, together with the motion for reconsideration, and the motion for spousal support, were the only parts of the appeal record unavailable to the Nevada Supreme Court in the appellate cases sought to be reviewed by certiorari. This petition for certiorari does not seek to review Nevada Supreme Court final disposition of Sherri's notice of appeal file marked November 5, 1986. The reason this petition for certiorari does not seek such review is plain. There is no final disposition. The appeal file marked November 5, 1986 is not docketed in the Nevada Supreme Court. It remains pending.

The Nevada Supreme Court ground of decision that Sherri failed to pay Mickey a total of $1,000 in monetary sanctions is untenable. By its order of September 4, 1986, that court sanctioned Sherri $500 for contending that her Motion To Vacate Decree Of Divorce was entitled to be treated as a motion for a new trial; this contention was plausible. Whereas the Nevada court found the motion's label dispositive, case law clearly supports her reliance on both the substance and timing of her motion as indicative of its true nature. By its order of October 29, 1987, the Nevada Supreme Court misconceived the limited scope of Sherri's appeal of August 12, 1986, characterized it as duplicitous, and sanctioned her an additional $500. This appeal had to be taken to protect her interests because of

the doubtful finality of a district court order entered April 18, 1985, and the possible prematurity of her May 22, 1985, appeal. On the date this appeal was taken (8/12/86), neither of these issues had been resolved, nor could Sherri prudently predict the nature of any future resolution (which occurred in the order entered 9/4/86).

THE ISSUE OF ADEQUACY OF COUNSEL DOES NOT REACH THE LEVEL OF A REQUEST THAT FREE COUNSEL BE PROVIDED FOR INDIGENT AND/OR PRO SE PETITIONERS

There is a due process requirement that the court look for clear warning signs as to the adequacy of counsel or ability of a given plaintiff to represent him or herself. This does not impose on any court an obligation to provide "free" counsel for indigents and/or others appearing pro se in divorce actions.

Sherri has thus far been denied a review on the merits of her claim that she was denied a fair hearing at her original appearance in the Nevada courts by failure of the presiding judge to make any attempt to ascertain whether she was able to represent herself and to warn her of the inherent dangers of acting without counsel. He further failed to advise her of her right to counsel and of the availability of assistance in finding an attorney. The judge failed to ask any questions addressed to her condition and/or competency; such inquiry would have elicited facts compelling an impartial jurist to delay granting of a divorce on that date. Expert testimony has shown that she was incapable of representing herself at that time.[4]

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[4]Sherri Spillane was severely depressed and mentally incompetent at the time of the Nevada divorce proceedings in the opinion of psychiatrist John P. Feighner, M.D. contained in his

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The judge compounded this error by allowing an ex parte amendment of the divorce decree and failing to notify her adequately of the changes made therein.[5] The Nevada Supreme Court's refusal to address the issue of competency has still further compounded this error and served to once again deny by avoidance a divorce petitioner's due process rights.

Respectfully submitted,

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deposition in evidence (exhibit # 53) at the trial in the consolidated companion action for civil fraud. At page 27 of the deposition Dr. Feighner testified:

> DR. FEIGHNER: ". . . her reasoning and judgment were massively impaired, . . . she made decisions which no reasonable person under similar circumstances would have made at that point in time, and . . . it's consistent . . . with the fact that she was mentally incompetent at that period of time."

[5]On April 29, 1983, Judge Legakes wrote to Petitioner:

"Dear Ms. Spillane:

"Enclosed please find a certified copy of your amended decree of Divorce which I amended on April 26, 1983. Since your original Decree did not coincide completely with your ex-husband's Answer in Proper Person, the Decree had to be amended.

"If you have any questions regarding this matter, please contact my office."